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Powell, Thomas Reed

Coercing a state to pay a judgement

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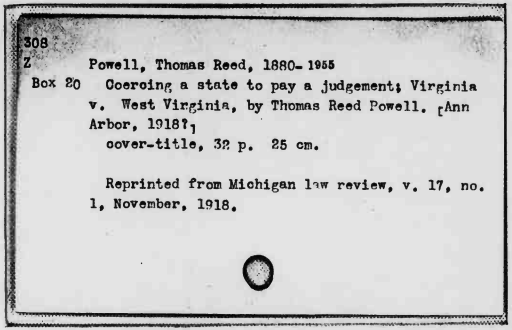

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Coercing a State to Pay a Judgement: Virginia v. West Virginia

BY

THOMAS REED POWELL

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COERCING A STATE TO PAY A JUDGMENT: VIRGINIA V. WEST VIRGINIA

THE Eleventh Amendment to the Federal Constitution postponed for over a century the settlement of the question whether a state of the United States can be coerced to pay a money judgment rendered against it in the Supreme Court of the United States. This it did by postponing the rendition of money judgments against a state. In 1793, it will be remembered, *Chisholm* v. *Georgia*[1] had held that the provisions of Article III of the Constitution, extending the federal judicial power "to controversies * * * between a state and citizens of another state," and giving the Supreme Court original jurisdiction "in all cases in which a state shall be a party," authorized the Supreme Court to entertain an action in assumpsit brought against a state by a citizen of another state. The decision evoked such objections that the Eleventh Amendment speedily followed.[2] The amendment by its terms excluded from judicial cognizance only those suits against a state brought by citizens of another state. Nothing was said about suits brought against a state by one of its own citizens. But the federal jurisdiction based on the character of the parties did not include such suits. The only ground on which they might be entertained would be that the nature of the controversy gave rise to federal jurisdiction independently of the character of the parties. Strangely enough it was not until 1890 that the Supreme Court was called upon to pass judgment on such an assertion of jurisdiction. *Hans* v. *Louisiana*[3], decided in that year, held that the spirit

[1] 2 Dall. 419 (1793).

[2] "That decision was made in the case of *Chisholm* v. *Georgia*, 2 Dall. 419, and created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the eleventh amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the states." Mr. Justice Bradley in *Hans* v. *Louisiana*, 134 U. S. 1, 11 (1890).

[3] 134 U. S. 1 (1890).

of the Eleventh Amendment and the general principles of public law forbade a suit against a state by one of its own citizens, even though a federal question was involved.

There is abundant evidence that, if the states had remained subject to suit by individuals, it would long ago have been settled whether a money judgment against a state could be enforced. Before *Chisholm* v. *Georgia*[4], the Supreme Court had threatened the state of New York with judgment by default if it did not appear and show cause to the contrary in a suit brought by one Ostwald.[5] The second case to come before the Supreme Court was *Vanstophorst* v. *Maryland*,[6] and bills in equity against a state appear in two cases[7] after *Chisholm* v. *Georgia*[8] and before *Hollingsworth* v. *Virginia*,[9] in which it was held that the Eleventh Amendment deprived the court of jurisdiction over suits pending before its enactment. The fledgling states, as is well known, were in the financial predicament of Mr. Micawber; and an important "something" that "turned up" to relieve them of embarrassing engagements was the Eleventh Amendment that shielded them from the toils of the law.[10]

In later times, too, various states have had occasion to seek the protection of the same shield. In view of the fact that it is now Virginia who, through counsel, is expressing righteous indignation in charges of "repudiation" hurled against another state made from her rib, it is interesting to note that Virginia has not infrequently adduced the Eleventh Amendment in resisting the fulfillment of her obligations.[11] Louisiana,[12] Georgia[13] and North Carolina[14] are also to be numbered among the states that have sought to evade or postpone the payment of their debts by pleading the Eleventh Amendment. Wherever shelter has been found for state funds or

[4] Supra, note 1.

[5] *Ostwald* v. *New York*, 2 Dall. 414 (1793). This case appears twice before in 2 Dall. 401 (1792) and 2 Dall. 402 (1792).

[6] 2 Dall. 401 (1791).

[7] *Grayson* v. *Virginia*, 3 Dall. 320 (1796), and *Huger* v. *South Carolina*, 3 Dall. 339 (1797).

[8] Supra, note 1.

[9] 3 Dall. 378 (1798).

[10] "It is a part of our history that, at the adoption of the Constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the Federal courts formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the state legislatures." Chief Justice Marshall in *Cohens* v. *Virginia*, 6 Wheat. 264, 406 (1821).

[11] *Virginia Coupon Cases*, 114 U. S. 269 (1885); *Barry* v. *Edmunds*, 116 U. S. 550 (1886); *McGahey* v. *Virginia*, 135 U. S. 662.

[12] *Louisiana* v. *Jumel*, 107 U. S. 711 (1883); *New Hampshire* v. *Louisiana*, and *New York* v. *Louisiana*, 108 U. S. 76 (1883); *Hans* v. *Louisiana*, 134 U. S. 1 (1890).

[13] *Cunningham* v. *Macon & B. R. Co.*, 109 U. S. 446 (1883).

the lack of them, the reason has been that the state was not subject to suit, and that the suits in question were substantially, if not formally, suits against the state. Manifestly, therefore, the decisions and the doctrines of these cases have no bearing upon the question whether a state, when it is subject to suit, can be made to pay if judgment is rendered against it.

I

It is this latter issue which Virginia and West Virginia have been contesting since Virginia obtained a judgment against West Virginia for what the Supreme Court determined to be West Virginia's equitable share of the debt of the Commonwealth of Virginia existing at the time when certain counties seceded and formed themselves into the new state of West Virginia. With proceedings anterior to that judgment, we are no longer concerned, except as certain of the provisions of the West Virginia constitution which furnished grounds for her liability may also be regarded as indicating the duty of her legislature to find a way of paying the sum adjudged to be due. The judgment is now of record.[15] It was rendered in a controversy between states, to which the Constitution explicitly extends federal judicial jurisdiction. Virginia is now seeking to secure its payment in mandamus proceedings against the members of the West Virginia legislature. Whatever may be the difficulties in forcing them to take action to raise funds to pay the obligation, they do not include any objections that a suit against members of the West Virginia legislature is a suit against a state. Such a contention may be fully conceded. It is, however, entirely irrelevant; for it is pertinent only when the state itself is not subject to suit, which is not the case in suits brought by one state against another.

We may then dismiss from consideration the cases in which the Supreme Court has declined to coerce a state through action against its officers. In like fashion we may set to one side the actual adjudications in which the Supreme Court has coerced municipalities through action against their officers.[16] These cases have, it is true, an element in common with the issue under consideration. They are cases in which the municipality was subject to suit and judgment. But the theory on which municipal officers were coerced

[14] *Christian* v. *Atlantic & N. C. R. Co.*, 133 U. S. 233 (1890).

[15] *Virginia* v. *West Virginia*, 238 U. S. 202 (1915).

[16] *Supervisors* v. *United States*, 4 Wall. 435 (1867); *Von Hoffman* v. *Quincy*, 4 Wall. 535 (1867); *Riggs* v. *Johnson*, 6 Wall. 166 (1868); *Labette County Commissioners* v. *Moulton*, 112 U. S. 217 (1884).

by mandamus to exercise the municipal taxing power at the behest of judgment creditors was that under the existing law of the state they were under a ministerial duty to do the act commanded by the court. The state itself was not coerced by compelling municipal officials to do what the legislature of the state had made it their duty to do. In positing the existence of this duty imposed by the legislature, the Supreme Court has often disregarded later state statutes in favor of earlier ones, finding the attempted alteration or repeal of the prior law invalid as an impairment of the obligation of contracts. It has over-ridden the desires of the state as embodied in the latest expression of its legislature. But this is but an ordinary instance of declaring a state statute not the law of the state, because it was beyond the power of the legislature. With the invalid statute thrown into the discard in accordance with elementary notions of constitutional law and procedure, there remained only the prior state statute expressly or impliedly commanding the municipal officers to do the very things which the court directed. In enforcing compliance with this state law, the court did something quite different from compelling the state to make a law. And it is the making of a law which is sought to be coerced by the mandamus proceedings brought by Virginia against the members of the West Virginia legislature.

Equally inapposite to the present controversy between Virginia and West Virginia are the cases in which the Supreme Court has held that the judiciary cannot levy a tax[17] or collect a tax already levied.[18] Virginia does not ask the Supreme Court to levy a tax in West Virginia. It asks the court to order the West Virginia legislature to do so in default of making other provision for the discharge of the judgment debt. It desires the court to compel a legislature to raise the money, as it has often compelled municipal officers. This desire is in no way discountenanced by cases which hold that it is not the function of a court or its officers to do the actual work of tax gathering.

Thus we may approach the problem whether the legislature of a state may be compelled to raise the funds to pay a judgment in favor of another state, quite unembarrassed by decisions declining to coerce state officials or to levy or collect a tax through officers of the court, or by decisions compelling municipal officers to levy or collect a tax. In the opinions in these several groups of cases there are expressions which, abstracted from their context, lend aid to

[17] *Rees* v. *City of Watertown*, 19 Wall. 107 (1873); *Meriweather* v. *Garrett*, 102 U. S. 472 (1880).
[18] *Thompson* v. *Allen County*, 115 U. S. 550 (1885).

the contentions, now of Virginia, now of West Virginia, in the present controversy. In the absence of direct authority on the issue before the court, it is not unnatural that both parties should rely on the judicial declarations which seem on their face to support their respective positions. Manifestly, however, such expressions, uttered without thought of the particular issue with which the court now has to deal, cannot be of controlling, or of very great, importance in solving the instant problem.

No such light dismissal, however, can be made of some of the declarations of Mr. Justice BREWER in *South Dakota* v. *North Carolina*.[19] That was a bill brought by one state against another to compel payment of some bonds issued by the latter and acquired by the former through assignment, and in default of payment to foreclose the interest of the defendant state in some railroad stock acquired by the state in return for its bonds and pledged as security for their payment. The issue before the court was whether the controversy in question was in substance one between states. The minority, consisting of Mr. Justice (now Chief Justice) WHITE, who wrote the dissenting opinion, and Chief Justice FULLER and Justices MCKENNA and DAY, thought that it subverted the purpose of the Eleventh Amendment to regard transactions between a state and private individuals or corporations as capable of giving rise to a controversy between states. The majority, however, took the position that, since the plaintiff state was the real party in interest, the litigation was a controversy between states notwithstanding the nature of the original transaction out of which it arose.

The statements of Mr. Justice BREWER, of which notice must be taken, were made in the course of discussing the contention that the court had no jurisdiction to entertain a demand for a money judgment against a state, for the reason that it had no power to compel the payment of such a judgment. Mr. Justice BREWER observed that the premise, if granted, did not lead to the conclusion: but, in discussing the pros and contras of the premise, he referred to "the absolute inability of a court to compel a levy of taxes by a legislature."[20] Earlier he had said that "a levy of taxes is not within the scope of the judicial power except as it commands an inferior municipality to execute the power granted by the legislature."[21]

These observations were made with direct reference to the possibility of compelling a state to pay a money judgment. They are, however, put forward *arguendo* only, and no conclusion is drawn

[19] 192 U. S. 286 (1904).
[20] 192 U. S. 286, 321.
[21] 192 U. S. 286, 319.

from them. They are not explicitly referred to any precedents for support. But a quotation from *Rees* v. *Watertown*[22] indicates that Mr .Justice BREWER had that case in mind when he confined the power of the court with respect to a levy of taxes to commands issued to an inferior municipality. The quotation is to the effect that "this court has not the power to direct a tax to be levied for the payment of these judgments."[23] But it is evident that the statement in its original context means only that the court will not direct the marshal to subject the private property of individuals to the payment of the debt of the municipality as it was asked to do by the complainant in the case. For the decision is that the complainant can have no remedy in equity, since his remedy at law by writ of mandamus to compel the municipal officers to exercise its taxing power must be deemed adequate, even though it turns out to be practically fruitless. Three such writs of mandamus had already been granted, and the court calls it "the regular remedy in a case like the present."[24]

The case which Mr. Justice BREWER appears to have had in mind, therefore, decided merely that a chancellor would not order a marshal to act as assessor and collector. It did not distinguish between coercing municipal officials and coercing members of the state legislature, but between coercing municipal officials and substituting for them a marshal. Yet Mr. Justice BREWER infers from it or from some other source "the absolute inability of a court to compel a levy of taxes by the legislature." If he assumed that he was merely repeating well-established law, his dictum may be dismissed as unfounded. But if it was an expression of his opinion of what the law ought to be, it cannot be rejected because directed to some other issue than that involved in the controversy between Virginia and West Virginia. For it was uttered with explicit reference to the question whether the legislature of a state which was a judgment debtor to another state could be compelled to exercise its legislative powers to raise money to pay the judgment. However unsupported by previous authority, it is a clear dictum in favor of West Virginia's motion to discharge the rule in mandamus.

Aside from this dictum, however, there is no authority on the issue raised by the states now contending. We have therefore one of the not infrequent instances in which a court must make some new law. It must declare for the first time either that a state can-

[22] 19 Wall. 107 (1873).
[23] 19 Wall. 107, 116, quoted in 192 U. S. 286, 319.
[24] 19 Wall. 107, 124.

not be coerced to pay a judgment rendered against it, or that it can. In making this new law, the court will undoubtedly be influenced by old law on analogous situations. But in so far as it exercises a choice in rejecting or accepting competing analogies pressed upon it, in finding the previous situations too remote from, or sufficiently close to, the situation now before it, it is making up its own mind on the significance of the points of difference and resemblance between the past and the present. And on the problem of what weight to attach to those points of difference or resemblance, separately and collectively, the previous authorities are not precedents. They decide the questions then in issue, not other questions confessedly different. How different the new question is and what difference the difference makes are new questions with every new question.

Though the Supreme Court is now called upon to solve a problem hitherto unsolved, customary technique places the new wine in old bottles. The decision is apt to be brought within some familiar aphoristic formulation which men and lawyers are wont to call a general principle. And counsel for Virginia and for West Virginia bring forward formulations and annexed corollaries on which they respectively rely.

West Virginia resists the motion for the mandamus by asserting that the writ has never been granted to compel the exercise of a discretionary act, and that it rests with the discretion of the West Virginia legislature to determine to what use it shall put its distinctly legislative powers of taxation. The use of this discretionary power has not been granted to any federal authority and is therefore one of the powers reserved to West Virginia by the Tenth Amendment. It is conceded that jurisdiction to render judgment includes jurisdiction to issue proper process to collect the judgment. It would be proper process to issue an execution against any property of a private nature which West Virginia might chance to own. But the fact that she happens to be execution proof does not authorize the issue of an essentially improper process such as mandamus to compel the performance of a function not ministerial. Failure to compel satisfaction of a judgment because the only proper process does not bring desired results involves no substitution of "judicial incompetence" for "judicial power," as Virginia contends, because "judicial power means power according to the forms of law, and that means according to the usages and principles of jurisdiction as fixed by the history of our jurisprudence."[25] Mandamus, if

[25] Reply Brief of Defendants, page 6.

granted, might be unavailing in case the legislators either resigned or refused to obey, as has happened in the case of municipal officials. And if in compliance with a writ the legislature voted to levy a tax, "no member would be acting as a legislator."[26] "He would not be a lawmaker, for the law would have been already made" by the court which ordered his action and thus had usurped the powers of the state in violation of the Tenth Amendment.

Virginia's opposing contentions may be summarized as follows. The duty of West Virginia to pay the judgment is established by the rendition thereof in a cause in which the Supreme Court had jurisdiction. The jurisdiction of a court to render judgment necessarily includes power to coerce the payment thereof. A state with no reserved power to resist the rendition of a judgment has no reserved power to resist ancilliary proceedings to compel its satisfaction. The duty of the West Virginia legislature to provide funds to pay the judgment is mandatory and not discretionary. The mandamus proceedings do not seek to dictate how the legislature shall raise the funds, but leaves it a choice and asks for the levy and collection of a tax only in case other means are not adopted. West Virginia has no discretion whether it shall pay or not pay. It has only a choice of means of finding the wherewithall to pay. It must choose some means. Virginia asks the West Virginia legislature to adopt a particular means only in case it neglects to employ any or all of the alternative means and thereby declines to exercise its discretion and fails to perform its mandatory obligation to use some means.

II

Such in substance are the positions of the parties as disclosed in their briefs. From them we turn to the opinion of the Supreme Court rendered on April 22, 1918.[27] This opinion, written by the Chief Justice, discusses but does not determine the question whether the writ of mandamus will be granted. It affirms the duty of West Virginia to pay the judgment and the power of the court to compel such payment, but it leaves open, and orders a reargument on, the question of ways and means. It not only invites West Virginia to pay, but warns her in unmistakable terms that if necessary she will be coerced to pay. In discussing possible ways of exercising coercion, it goes beyond the prayer of Virginia and suggests for argument further expedients which may be adopted in case

[26] *Ibid.*, page 5.
[27] *Virginia* v. *West Virginia*, 246 U. S. 565 (1918).

technical difficulties prove insuperable to granting the writ of mandamus.

As an indication of what the ultimate result will be, the opinion is definitive. Law, as Mr. Justice HOLMES reminds us, is a prophecy of what courts will do in fact.[28] So the opinion of Chief Justice WHITE is a prophecy that the Supreme Court in fact will compel West Virginia to pay. It therefore declares the law that a state can be coerced to pay a judgment rendered against it in favor of another state. But the opinion reserves for the future the determination of the method by which this will be accomplished, if coercion continues to be necessary. It expresses the hope, if not the conviction, that such necessity will not continue. Its monition and its invitation are both conveyed in the statement that "we are fain to believe that if we refrain now from passing on the questions stated, we may be spared in the future the necessity of exerting compulsory power against one of the states of the Union to compel it to discharge a plain duty resting upon it under the Constitution".[29]

The opinion starts with an affirmation of the proposition relied on by Virginia to the effect that "judicial power essentially involves the right to enforce the results of its exercise".[30] Three cases are cited in support of the principle. *Wayman* v. *Southard*[31] and *Bank of United States* v. *Halstead*[32] held that the jurisdiction of the federal courts did not end with the rendition of judgment but included the issue of execution in conformity to federal practice uncontrolled by any statute of a state. *Gordon* v. *United States*[33] decided that the power to grant an execution was an essential part of judicial power, and that Congress could not give the Supreme Court an appellate jurisdiction over the Court of Claims where that court was by statute forbidden to issue executions on its judgments. None of these three cases touches the question of compelling a state to pay a judgment; but the Chief Justice follows their citation with the sentence: "And that this applies to the exertion of such power in controversies between states as a result of the exercise of the jurisdiction conferred upon this court by the Constitution is therefore

[28] "The prophecies of what courts will do in fact, and nothing more pretentious, are what I mean by the law." "The Path of the Law," 10 Harvard Law Review 457, 461.
[29] 246 U. S. 565, 604-605.
[30] 246 U. S. 565, 591.
[31] 10 Wheat. 1 (1823).
[32] 10 Wheat. 51 (1823).
[33] This case was decided in 1864 and an opinion prepared by Chief Justice Taney shortly before his death. The opinion was lost, and a brief opinion was later rendered by Chief Justice Chase and reported in 2 Wall. 561 (1865). Later the opinion of Chief Justice Taney was discovered and is printed in the appendix of volume 117 of the official edition of the Supreme Court reports, at page 697.

certain".[34] He regards the point as established by the many cases in which the court has exercised jurisdiction in controversies between states. He adds that the fact that in all cases the judgments of the court were voluntarily respected and given effect to cannot be regarded as establishing the contrary "unless it can be said that because a doctrine has been universally recognized as being beyond dispute and has hence hitherto in every case from the foundation of the government been accepted and applied, it has by that fact alone become a fit subject for dispute".[35]

But West Virginia does not dispute the proposition that power to render a judgment against a state includes power to issue process to enforce the judgment. It simply insists that the process must be proper process and that mandamus against the members of the legislature is not of that description. It concedes that execution would be proper process if confined to property owned by the state in a non-governmental capacity. The primary position of the Chief Justice is not conclusive of the question raised by West Virginia unless power to render judgment against a state necessarily includes power to take any and all further steps that may be practically necessary to enforce the judgment. Plainly the Supreme Court avoids going to this extent at present. It invites further argument on the propriety of any specific procedure. Its initial paragraph, therefore, merely refutes a straw contention that the power of the court is exhausted with the rendition of the judgment. But this is a contention not advanced by the defendant state.

The ensuing paragraph of the opinion discusses the bearing of *South Dakota* v. *North Carolina*[36] upon the issues before the court. No reference is made to the statement of Mr. Justice Brewer which seemingly conceded "the absolute inability of a court to compel a levy of taxes by a legislature",[37] or to any consideration in the opinion in the Dakota case of the problem of coercing a state to pay a judgment duly rendered against it. The Chief Justice refers only to the fact that in the opinion in the Dakota case "it was remarked that doubt had been expressed by individual judges as to whether the original jurisdiction conferred on the court by the Constitution embraced the right of one state to recover a judgment in a mere action of debt against another".[38] This is dismissed by pointing out that the doubt was not solved in the Dakota case, since "the

[34] 246 U. S. 565, 591.
[35] 246 U. S. 565, 592.
[36] Supra, note 19.
[37] Supra, page 5.
[38] 246 U. S. 565, 592.

question was not involved",[39] and that any question on the point need not now be considered "because the power to render the judgment as between the two states whose enforcement is now under consideration is as to them foreclosed by the fact of its rendition".[40]

Inasmuch as West Virginia no longer contests the power of the court to render the judgment it has rendered, the discussion of the question seems surplusage. It does not touch the effect or validity of Mr. Justice BREWER'S dictum in the Dakota case on which West Virginia relies and which, if accepted and approved, seems to sustain its contention. Equally unnecessary, too, seems the further reason given for not considering whether the court can entertain an action of debt brought by one state against another. This reason is stated as follows:

> "And second, because while the controversy between the states culminated in a decree for money and that subject was within the issues, nevertheless the generating cause of the controversy was the carving out of the dominion of one of the states the area composing the other and the resulting and expressly assumed obligation of the newly created state to pay the just proportion of the pre-existing debt, an obligation which as we have seen rested in contract between the two states, consented to by Congress and expressed in substance as a condition in the Constitution by which the new state was admitted into the Union".[41]

If one were required to venture a surmise for this part of the Chief Justice's opinion, a clue might be found in the fact that three of the justices who dissented in *South Dakota* v. *North Carolina*[42] are still on the bench. It may be that the Chief Justice wished to make it clear that West Virginia could derive no comfort from that fact, since he and the other dissentients in the Dakota case sharply differentiated that dispute from the issue between Virginia and

[39] The decree in the case ordered North Carolina to "pay said amount with costs of suit to the state of South Dakota . . . and . . . in default of such payment" ordered the sale of the railroad stock owned by North Carolina and pledged for the payment of its bonds. But the opinion treated the order to pay the money merely as a foundation for the order of sale, Mr. Justice Brewer saying: "There is in this case a mortgage of property, and the sale of that property under a foreclosure may satisfy the plaintiff's claim. If that should be the result, there would be no necessity for a personal judgment against the state. . . . Equity is satisfied by a decree for a foreclosure and sale of the mortgaged property, leaving the question of a judgment over for any deficiency to be determined when, if ever, it arises." 192 U. S. 286, 321.
[40] 246 U. S. 565, 592.
[41] 246 U. S. 565, 592-593.
[42] Supra, note 19.

West Virginia. Viewed from this angle, the comment in the Dakota case, though surplusage, adds to the force of the plain admonition that West Virginia must pay voluntarily or involuntarily.

That admonition is unmistakably clear in the discussion of the first of the two subjects with which the remainder of the opinion deals. This subject is stated as "the limitations on the right to enforce inhering in the fact that the judgment is against a state and its enforcement against such governmental being".[43] And the treatment of it is introduced by the question: "May a judgment rendered against a state as a state be enforced against it as such, including the right to the extent necessary for so doing of exerting authority over the governmental powers and agencies possessed by the state"?[44] This question goes to the root of West Virginia's contention in so far as it is based on the Tenth Amendment. And the clear and definite answer is given that she acquires no protected position by reason of the fact that she is a state.

After summarizing the contentions of Virginia,[45] whose "significance" and "scope" are said to be "aptly illustrated" by the reference in the argument to the cases sustaining the power of the courts to enforce the levy of a tax by a municipality, the Chief Justice states and analyzes the reply of West Virginia. "West Virginia insists that the defendant as a state may not as to its powers of government reserved to it by the Constitution be controlled or limited by process for the purpose of enforcing the payment of the judgment".[46] It argues that the recognition of the power to issue execution against state property not used for governmental purposes "affords no ground for upholding the power by compelled exercise of the taxing authority of the state to create a fund which may be used when collected for paying the judgment".[47] The contention that judicial power to adjudicate the controversy between the states does

[43] 246 U. S. 565, 593.
[44] 246 U. S. 565, 593-594.
[45] "On this subject Virginia contends that as the Constitution subjected the state of West Virginia to judicial authority at the suit of the state of Virginia, the judgment which was rendered in such a suit binds and operates upon the state of West Virginia, that is, upon that state in a governmental capacity, including all instrumentalities and agencies of state power, and indirectly binding the whole body of the citizenship of that state and the property which by the exertion of powers possessed by the state are subject to be reached for the purpose of meeting and discharging the state obligation. As then, the contention proceeds, the Legislature of West Virginia possesses the power to tax and that body and its powers are all operated upon by the judgment, the inability to enforce by means of ordinary process of execution gives the right and sanctions the exertion of the authority to enforce the judgment by compelling the Legislature to exercise its power of taxation." 246 U. S. 565, 594.
[46] 246 U. S. 565, 594-595.
[47] 246 U. S. 565, 595.

not warrant interference with rights reserved by the Constitution is treated as based on the argument that "since although the authority to enforce the adjudication may not be denied, execution to give effect to that authority is restrained by the provisions of the Constitution which recognize state governmental power".[48]

This seeming inference that counsel for West Virginia concede that "authority to enforce the adjudication may not be denied" requires examination. The Chief Justice seems to think that they start with the same premise as do their opponents, for he says:

> "Mark, in words a common premise—a judgment against a state and the authority to enforce it—is the predicate upon which is rested on the one hand the contention as to a complete and effective, and the assertion on the other of limited and inefficacious power".[49]

But what may be in words a common premise is not a common premise in substance. When Virginia thinks of "authority to enforce the adjudication", she has in mind authority to take whatever steps may be practically necessary to compel its satisfaction. Her premise contains already her conclusion of a complete and effective power. In so far as West Virginia, on the other hand, concedes the existence of "authority to enforce the adjudication", she means only authority to take steps towards enforcing it by issuing an execution against non-governmental property, if such there be. What may be in words a common premise can be made common in substance only by unwarrantably enlarging West Virginia's concessory recognition of authority to enforce the judgment in one particular way into authority to enforce it in some general or universal sense. And this concession is not the premise on which she predicates her contention of a limited, and under certain circumstances an inefficacious, power. Her premise is that a state cannot be coerced to exercise its governmental powers. This premise, like that of her opponent, is made in the image of the conclusion drawn therefrom. Virginia and West Virginia part company, not by taking different lanes from a common premise, but by selecting at the outset different premises, each of which leads unerringly to the desired goal.

Plainly enough, therefore, the court must choose between the competing premises which the contending parties respectively urge upon it. West Virginia's concession that "authority to enforce the adjudication may not be denied" is limited to a specific method of

[48] 246 U. S. 565, 595.
[49] 246 U. S. 565, 595.

enforcement, and the existence of that method is not in logic necessarily inconsistent with the non-existence of some other method. No action on the part of state authorities is necessary when the court issues an execution against state property. This method of enforcing a judgment does not involve the coerced exercise of state powers by state authorities. The confession, therefore, that a state is not immune from one form of coercion does not inexorably force the abandonment of any claim to immunity under the Tenth Amendment to any other form of coercion.

Nevertheless the considerations that permit the use of one method of compulsion may well furnish sufficient grounds for the refusal to countenance certain objections to other methods of enforcement. This does not follow syllogistically, but much that is wise and desirable can be securely built on something less mechanical than the syllogism. The argument of the Chief Justice amounts to saying that the conception of a state which insists that because it is a state its legislature is immune from compulsion is in common sense incompatible with the conception which concedes that it may be forcibly deprived of its property. The court in passing title to state property on an execution is achieving what might be accomplished by the state itself through an exercise of its governmental powers. It is substituting the judicial power of the nation for the legislative power of the state. It is acting inconsistently with the conception of a state as an independent member of the body of states in the international sense. It is affirming that a state of the United States is not what we know as a sovereign or completely sovereign state, and is thereby laying a sufficient basis for the dismissal of claims to immunities which are based on a premise of sovereignty.[50]

The Chief Justice makes this clear in a later sentence:

> "As it is certain that governmental powers reserved to the states by the Constitution—their sovereignty—were the efficient cause of the general rule by which they were not subject to judicial power, that is, to be impleaded, it must follow that when the Constitution gave original jurisdiction to this court to entertain at the instance of one state a suit against another it must have been intended to modify the general rule, that is, to bring the states and their governmental authority within the exceptional judicial power which was created.[51]

[50] In a passage which does not make its meaning wholly clear, and which the writer may misinterpret, the Chief Justice seems to indulge in the paradoxical position that it is the argument of West Virginia rather than that of Virginia that minimizes the reserved powers of the states. After saying that the common premise of a judgment against a state and the authority to enforce it "is the predicate on which is rested on the one hand the contention as to the existence of complete and effective, and the assertion on the other of limited and inefficacious power," he continues: "But it is obvious that the latter [referring, as the writer interprets it to the contention of West Virginia that the power of the Supreme Court to enforce a judgmen against a state is a limited and inefficacious power] can only rest upon either treating the word 'state' as used in the premise as embracing only a misshapen or dead entity, that is, a state stripped for the purpose of judicial power of all its governmental authority, or if not, by destroying or dwarfing the significance of the world 'state' as describing the entity subject to enforcement, or both." 246 U. S. 565, 595.

He goes on to say that "no other rational explanation can be given for the provision". And then he adds:

> "And the context of the Constitution, that is, the express prohibition which it contains as to the power of the states to contract with each other except with the consent of Congress, the limitations as to war and armies, obviously intended to prevent any of the states from resorting to force for the redress of any grievance real or imaginary, all harmonize with and give force to this conception of the operation and effect of the right to exert, at the prayer of one state, judicial authority over another".[52]

A state of the United States, then, is stripped of all attributes of sovereignty, so far as concerns any claimed immunity from the coercive power of the Supreme Court to compel payment of a judgment rendered against it in favor of another state. Whatever objections it may still urge against any particular form of procedure, these do not include reliance on any characteristic or quality of its statehood or on any inference therefrom. When subject to suit and judgment, a state has no more legal or political majesty behind which to shelter itself from coercion than has a municipality. West Virginia's claims under the Tenth Amendment are based on a premise of sovereignty which the Supreme Court unequivocally rejects. These claims of reserved powers or immunities are said to conflict with the claims of all the states to sue and obtain satisfaction, and the latter are regarded as superior. As the Chief Justice puts it, "it is difficult to understand upon what ground of reason the preservation of the rights of all the states can be predicated upon the assumption that any one state may destroy the rights of any other without any power to redress or cure the resulting grievance".[53]

The conclusions based on analysis and choice of competing prem-

[51] 246 U. S. 565, 595-596.
[52] 246 U. S. 565, 596.
[53] 246 U. S. 565, 596.

ises are fortified by the "history of the institutions from which the provisions of the Constitution under review were derived".[54] History, of course, has the same possibilities of diverse uses as have figures. The Chief Justice relies mainly on the position that the impotence of Congress under the Articles of Confederation to enforce its adjudications created "an evil that cried aloud for cure" and that "the dangers of the past and the unalterable purpose to prevent their recurrence in the future" was the motivating cause of the provisions in the Constitution which "combined to unite the authority [of the Supreme Court] to decide [controversies between states] with the power to enforce" its decisions.[55] It may be doubted whether the appeal to history adds much to the conclusion of the court reached on independent grounds.[56] That, at any rate, is a matter which may now be left to the historians. Certain it is that in many respects a state of the United States is shorn of attributes of sovereignty which it possessed before the federal Constitution. If it was formerly debatable whether there survived some remnant of sovereignty which saved a state from coercion to pay a judgment rendered against it, the debate is now closed by the opinion of the court under review. The body duly vested with authority to decide the question has decided it. There is no mistaking the implications of the court's utterance. In inviting further argument on the question whether mandamus is the appropriate remedy for compelling the state to discharge what was later called "a plain duty resting upon it under the Constitution",[57] the scope of the invitation was significantly limited by the statement that "in so far as the duty to award that remedy is disputed merely because authority to enforce a judgment against a state may not affect state power, the contention is adverse-

[54] 246 U. S. 565, 597.

[55] 246 U. S. 565, 590.

[56] Chief Justice White also seeks support from the situation in colonial times when disputes between the colonies were adjudicated by the Privy Council, "the sanction afforded to the conclusions of that body being the entire power of the realm, whether exerted through the medium of a royal decree or legislation by Parliament" (246 U. S. 565, 597). But as Dean Bates points out in the Michigan Law Review (volume 16, pages 617-621) this "is not persuasive, for our entire governmental machinery under English rule was totally different from that existing after the Declaration of Independence." An editorial writer in the Harvard Law Review (volume 31, pages 1158-1161) goes further and says that "it would not seem unreasonable, then, to believe that neither the framers of the Constitution nor subsequent judicial expounders considered that the court had this enforcing power over the states in the absence of a direction by Congress." The writer infers from the fact that prior to the Constitution the judicial function in controversies between states had been performed by a court which admittedly had no power to enforce its decrees, that no greater power was included in the grant in the Constitution to the Supreme Court. The Chief Justice, as we have seen, infers the opposite.

[57] 246 U. S. 565, 604.

ly disposed of by what we have said".[58] And that part of the opinion heretofore under consideration is summed up as follows:

> "The state, then, as a governmental entity having been subjected by the Constitution to the judicial power under the conditions stated, and the duty to enforce the judgment by appropriate remedies being certain *even though their exertion may operate upon the governmental powers of the State,* we are brought to consider the second question * * *".[59]

III

This second question is: "What are the appropriate remedies for such enforcement?"[60] Of its own motion the court asks whether Congress has power "to legislate for the enforcement of the obligation of West Virginia",[61] and determines that it has. Since the obligation arose from a contract between the states, consented to by Congress, the power of Congress to refuse or to consent necessarily carries with it the right to ensure the enforcement of the agreement to which its consent was necessary. This power "is plenary and complete, limited of course as we have just said by the general rule that the acts done for its exertion must be relevant and appropriate to the power".[62] But it is added that "the lawful exertion of its authority by Congress * * * is not circumscribed by the powers reserved to the states".[63] Care is taken also to point out that the existence of this power in Congress to legislate is not "incompatible with the grant of original jurisdiction to this court to entertain a suit between the states on the same subject".[64] One is legislative power to create new remedies in addition to those now available under the Judicial Code. The judicial power is distinct from this. "The two grants in no way conflict but co-operate and co-ordinate to a common end: that is, the obedience of a state to the Constitution by performing the duty which that instrument exacts".[65] The plain implication of this is that the power of Congress to create new remedies in no way negatives the existence of adequate remedies already available to the court by implication from its power to hear and to determine.

[58] 246 U. S. 565, 604.

[59] 246 U. S. 565, 600. Italics are writer's. On page 604 the opinion speaks of "the right judicially to enforce by appropriate proceedings as against a State and its governmental agencies having been determined."

[60] 246 U. S. 565, 600.

[61] 246 U. S. 565, 601.

[62] 246 U. S. 565, 602.

[63] 246 U. S. 565, 602.

[64] 246 U. S. 565, 603.

[65] 246 U. S. 565, 603.

From the consideration of what Congress might do, the opinion turns to the topic which it heads "the appropriate remedies under existing legislation".[66] It makes clear that mandamus is not inappropriate because it compels the exercise of governmental authority by a state. But it leaves undecided and asks for further argument on the question whether it is inappropriate because precluded by the existence of a discretion in the West Virginia legislature, or whether, as contended by Virginia, "the duty to give effect to the judgment against the state, operating on all state powers, excludes the legislative discretion asserted and gives the resulting right to compel".[67]

On this question, it would seem, the court should have little difficulty. It has already been determined that West Virginia is under a duty to pay the judgment, and that performance cannot be resisted because it is exacted of a state as a governmental entity. There is no dispute that the legislature is the body duly vested with authority to ensure the performance of this duty. The duty to make payment is mandatory and not discretionary. The only discretion possessed by the legislature is with respect to ways and means by which the mandatory duty to pay shall be performed. This discretion is not interfered with by the mandamus. For the prayer is that the legislature "shall assess and levy a tax upon the property within the State of West Virginia sufficient to provide for the payment of said judgment * * * unless the Legislature shall * * * make provision for the payment of said judgment by a duly authorized issue of bonds, the proceeds of which shall be sufficient to pay said judgment in full in cash".[68] The writ, if granted in accordance with the prayer, leaves open to the legislature the choice between the only two methods by which the duty may be performed.

The argument of West Virginia to the contrary presents no serious issue. This insists that the legislature under the state constitution has a discretion as to the methods both of taxation and of issuing bonds. It may raise a tax all at once or distribute it over a period of years.[69] If it issues bonds, it may do so under section 8 of the constitution of 1863 which requires provision for a sinking fund "sufficient to pay the accruing interest and redeem the principal within thirty-four years",[70] or under section 4 of article 10 of the present constitution which provides that "the payment of any liability other than that for the ordinary expenses of the State shall be

[66] 246 U. S. 565, 603.
[67] 246 U. S. 565, 604.
[68] West Virginia's Brief in Support of her Motion to Discharge the Rule in Mandamus, page 20.
[69] *Ibid.*, page 21.
[70] *Ibid.*, pages 17-18.

equally distributed over a period of at least twenty years".[71] That here is discretion must be conceded. But the mandamus need not interfere with its exercise. The writ is satisfied if bonds are issued under either provision and the money raised and paid to Virginia. And the court may easily leave to the legislature the choice of raising a sufficient tax in a single year or of distributing it over a period of years.

The further difficulty suggested by West Virginia that one house of the legislature may choose one method and the other house choose another[72] is also superable. They are under a duty to agree on some satisfactory expedient. They have discretion only as to the choice of the particular expedient on which they shall agree. If they fail to agree on any, they exhaust their discretion and are left with only the mandatory duty to provide for payment. The writ compels them to do a particular thing only in case they fail to exercise the other choices open to them. Having chosen not to adopt any of these alternatives, they have brought themselves to the position where no choice remains, and where the mandatory duty can be performed in only one way.

The argument of Virginia on this question of discretion is couched in general terms and is unsupported by authority. Its substance is contained in the following three brief paragraphs:

> "There is a vast difference between a discretion to do or not do a particular act, with no compulsion to do one thing or the other, and a discretion to do one of two things, with a duty to select.
>
> Should the Legislature of West Virginia see fit to raise the money by creating a bonded indebtedness, and with the proceeds, paying the debt, it may thus save the necessity of a large immediate levy.
>
> Its primary duty, however, is to pay the debt, and the only discretion conferred upon it is to determine whether it will pay it by exercising one power or another. Its duty is to exercise a power which will force payment."[73]

Reliance was also placed on Marshall's statement in *Marbury* v. *Madison*[74] that "it is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be deter-

[71] *Ibid.*, page 21. This part of West Virginia's argument is given on page 587 of volume 246 of the official edition of the United States Supreme Court Reports.
[72] 246 U. S. 565, 587.
[73] Virginia's Brief in Support of the Petition, page 30.

mined".[75] But any objections which West Virginia might have to the application of this principle to the present controversy are foreclosed by the opinion of the court.

Possibly the court's postponement of a decision on the question whether mandamus is an appropriate remedy is due in part to the desire for a more adequate and complete presentation of Virginia's contention. It seems more likely, however, that the chief reason for the postponement is to be found in the statement previously quoted from the opinion that "we are fain to believe that if we refrain now from passing upon the questions stated, we may be spared in the future the necessity of exerting compulsory power against one of the states of the Union to compel it to discharge a plain duty resting upon it under the Constitution".[76] This is to say that the court assumes that having made clear to West Virginia that its duty to pay the judgment is obligatory and that it cannot be resisted by reliance on any objections based on the premise that the governmental powers of a state cannot be coerced, no further steps will be necessary. It is not to be supposed that once the matter of duty is finally determined, a state will seek to evade or avoid its obligation. The tone and tenor of the whole opinion of the court indicates that the postponement of compulsion is due rather to motives of consideration and respect for West Virginia than to any doubts of the power of the court to exert it.

Though Virginia does not support her argument by authority, the principles on which she relies are elementary. As Dillon puts it:

> "The general rule is this: If the inferior tribunal, corporate body, or public agent or officer has a *discretion, and acts and exercises it*, this discretion cannot be controlled by *mandamus*. But if the inferior tribunal, body, officers, or agents refuse to act in cases where the law requires them to act, and the party has no other legal remedy, and where, in justice, there ought to be one, a *mandamus* will lie to set them in motion, to compel action; and, in proper cases, the court will settle the legal principles which should govern, but without controlling the discretion of the subordinate jurisdiction, body, or officer".[77]

In a footnote. the learned author, after citing many cases, proceeds:

> "The principle in the text is well illustrated by the case of *King* v. *Bristol Dock Co.*, 6 B. & C. 181, in which the dock

[75] 1 Cranch 137 (1803).
[76] Virginia's Brief in Support of the Petition, pages 26-27.
[77] 246 U. S. 565, 604.
[77] Municipal Corporations (5th ed.) section 1489, page 2657.

> company was authorized by Parliament to make a floating harbor in the city, and *required* 'to make such alterations and amendments in the sewers of said city as might or should be necessary in consequence of the floating of said harbor,' and it was decided that the directors might by *mandamus* be commanded, in the words of the act, 'to make such alterations,' etc.; but the nature of the alterations could not be specified, as this was a matter committed by Parliament to the judgment and discretion of the directors of the company".[78]

Spelling states the same point as follows:

> "But the fact that an officer has discretion as to the manner in which he shall perform an official duty does not justify a refusal to act at all. Thus, it was held that county commissioners would not be controlled by mandamus in the exercise of any discretion as to the character or style of the court-house or jail they should erect, or of the offices they should provide; yet the duty of erecting these buildings being imposed by law, if these or other officers refused to act, a writ of mandamus would issue to compel them to exercise the duties imposed upon them".[79]

Similar illustrations appear in cases where the writ has issued to compel the giving of an examination to determine whether relator is qualified to practice law,[80] and to compel a Civil Service Board to admit relator to an examination for an appointment to a position in the classified service.[81] In these cases the court left to the examining bodies the exercise of their own judgment as to the qualifications of the applicant, but it required them to exercise that judgment. This is what another court had in mind in saying that "courts on suitable occasions will apply the spur of mandamus to put the discretion of inferior courts and officers in motion".[82]

The text writers and cases thus support the principle that mandamus may be used to tell officers what they shall do. even though they must be left free to determine how they shall do it. They cannot fail to perform a duty merely because they have a choice as to how they shall perform it. The distinction rests on the difference

[78] *Ibid.*, page 2658.
[79] Injunctions and Other Extraordinary Remedies (2nd ed.) volume 2, pages 1195-1196, citing *State* v. *County Commissioners*, 22 Fla. 29, and *Reddick* v. *People*, 82 Ill. App. 85.
[80] *Florida ex rel. Lamson* v. *Baker*, 35 Fla. 598 (1889).
[81] *People ex rel. Ryan* v. *Wheeler*, 2 N. Y. St. Rep. 656 (1886).
[82] *State ex rel. Granville* v. *Gregory*, 83 Mo. 123 (1884).

between means and ends. It may be mandatory to achieve a given end, but discretionary to choose between alternative means. Obviously the mandatory duty would fail of enforcement, if those charged with its performance were entitled to say that, since each particular means rested in discretion when considered separately, they all rested in discretion when considered collectively. The distinction is plain and clearly established, even though it easily invites verbal quibbles.

The only escape from the application of these well-established principles to the case at bar lies in the fact that they have previously been applied only to what are commonly called "inferior officers". The duty in question has usually been imposed by the legislature, and officers have been coerced to do only what the legislature made it their duty to do. Or, as suggested in our discussion of the cases in which municipal officers have been compelled to levy a tax,[83] the court there did something quite different from compelling the state to make a law, whereas what Virginia now asks is that the Supreme Court compel West Virginia to make a law.

But the difficulty here is chiefly verbal. In both cases the levy of the tax is the making of a law. Ordinances as well as statutes are laws. The difference that the distinction seeks to point out is that the ordinance of the municipality which is coerced is passed in pursuance of a duty imposed by the legislature, while in most instances the legislature is itself under no duty to call into play its legislative power. But the difference has no bearing on the case in hand in which the legislature is under such a duty. This duty arose from the contract between Virginia and West Virginia, duly consented to by Congress. It was recognized and sanctioned by the constittuion of West Virginia in a provision which the Supreme Court in one of the earlier stages of the present litigation called "an exhortation and command from supreme to subordinate authority to perform the promise as soon as may be, and an indication of the way".[84] So the duty which the legislature of West Virginia is now asked to perform is enjoined upon it by the law of West Virginia as embodied in its constitution. The legislature is subject to the law of the constitution as the municipality is subject to the law of the legislature. The legislature is in the present situation an "inferior authority" in the same sense in which the cases and the text-writers have used that term in referring to the persons subject to mandamus. The duty is imposed upon it by the superior authority of the state constittution.

[83] Supra, pages 3 and 4.
[84] *Virginia* v. *West Virginia*, 220 U. S. 1, 30, (1911).

It is recognized, sanctioned and defined by the Supreme Court of the United States. With the dismissal of the contention that the state legislature, because it is the legislature of a state, is not subject to coercion, that body is for present purposes placed on the same level as the officers of a municipality, and is therefore subject to the canons applied to them in distinguishing between their obligatory and their discretionary functions.

It seems clear, then, that the court's denial of the existence of any discretion in the West Virginia legislature as to whether it shall or shall not make provision for paying the judgment, and its denial of the existence of any immunity from coercion on account of the involved interference with legislative and governmental functions of a state, foreshadow the exercise of coercion if it shall continue to be necessary. The existence of discretion as to the means that the legislature may adopt to perform its duty will necessarily influence the manner and extent of the coercion to be applied. The compulsion will go no further than is necessary to ensure the performance of the duty. But that far it will undoubtedly go. The only serious question in this respect is whether the court will force the legislature to make provision for immediate payment, or will be satisfied if it makes progress in that direction.

It is open to grave doubt whether the Supreme Court will respect the contention of West Virginia to the effect that the discretion of the legislature to raise the necessary amount by taxation in a single year or to distribute the burden over a number of years is a discretion that cannot be interfered with. The duty to be enforced is the duty to pay now. This is not performed by paying in installments. Such exercise of the particular discretion adduced by West Virginia necessarily involves recreancy to its fixed and determined duty. The court may therefore well hold that this particular discretion is submerged in the duty. The discretion which exists in general does not exist *ad hoc*. This decision will be the easier to reach because of the fact that it will not compel the levy of a tax in a single year sufficient to pay the judgment. The state will still have open to it the issue of bonds, which is the normal and sensible way of acquiring funds to meet exceptional obligations. Such bonds may be paid from taxes distributed over such a period as the legislature may deem best, within the limits set by the state constitution. Only for the purpose of embarrassing the judgment creditor without resulting advantage to the debtor state could the legislature of West Virginia choose slow taxation to pay the judgment rather than slow taxation to pay bonds issued to provide funds for immediate payment of the judgment. And any such use of discretion can with

good reason be brought within the rule that "in extraordinary and exceptional instances of gross abuse" even discretionary powers are "subject to judicial control".[85]

There remains for consideration only the contingency that mandamus, even if granted, might not secure satisfaction to Virginia. This is suggested by counsel for West Virginia in their reply brief:

> "If such a writ should be proper, it would necessarily operate upon the individual members of the two Houses of the legislative department of the State, and if they should disobey its mandate, however unsatisfactory the reason, they might lie in jail for contempt during their terms of office; and this would not bring the tax or pay the debt * * *".[86]

Counsel hasten to add that "one could scarcely conceive of such a result, and certainly would not anticipate it".[87] Nevertheless municipal officers have acted in this refractory and inconsiderate fashion,[88] and the contingency has interesting theoretical, if not practical, aspects.

It is not unlikely that it is the suggestion of this possibility by counsel for the defendant state that caused the Supreme Court of its own motion to ask for argument on the question "whether there is power to direct the levy of a tax adequate to pay the judgment and provide for its enforcement irrespective of state agencies",[89] and to announce that, in case it determined that any of the suggested processes were available, it reserved the right "to appoint a master for the purpose of examining and reporting concerning the amount and method of taxation essential to be put into effect, whether by way of order to the state Legislature or direct action, to secure the full execution of the judgment, as well as concerning the means otherwise existing in the state of West Virginia, if any, which by the equitable powers in discharge of the duty to enforce payment may be available for that purpose".[90] The court's request for argument on this question has added interest because of the concession by counsel for Virginia that "it may well be that this Court has no power, itself, to levy a tax".[91] To this concession is added the statement that "this power rests in the Legislatures of the different

[85] Dillon, *op. cit.*, sec. 1489 (volume 4, page 2656). See also Spelling, *op. cit.*, sec. 1384 (volume 2, page 1196).

[86] Reply Brief of Defendant, page 5.

[87] *Ibid.*

[88] See *Rees* v. *Watertown*, 19 Wall. 107 (1874), and *Yost* v. *Dallas County*, 236 U. S. 50 (1915). See also Dillon, *op. cit.*, sec. 1520 (volume 4, page 2699, note 5).

[89] 246 U. S. 565, 604.

[90] 246 U. S. 565, 605.

[91] Complainant's Brief in Support of the Petition, page 12.

States"[92] and the recognition that "there are several cases in which this Court has held that of itself, and by itself, it has no such power of tax assessment".[93] The cases referred to are the ones in which the court declined to serve as substitute for the taxing authorities of a municipality.[94] They did not involve attempts to collect money due from a state. And the Supreme Court, by now setting for argument a point conceded by the plaintiff against itself, indicates plainly enough that it is open to conviction that a state against which a money judgment has been entered in favor of a sister state may be subject to methods of coercion not applicable to a municipality.

Limits of space forbid an extended examination of the cases holding that a court will not itself exercise the taxing powers of a municipality or county. Such an examination is rendered unnecessary by the recent opinion of the Supreme Court in *Yost* v. *Dallas County*,[95] which places the earlier decisions on a ground which cannot avail West Virginia in the instant controversy. In view of the fact that this opinion was rendered on January 18, 1915, over two years prior to the argument before the Supreme Court on Virginia's motion for a mandamus, it is a little surprising that counsel for Virginia should have made the broad concession that the Supreme Court could not itself exercise the taxing powers of West Virginia. And since the fundamental issues in the Virginia-West Virginia controversy were decided in 1911,[96] it is not unnatural to infer that the expressions of the court in the Yost case,[97] in 1915, were uttered with direct reference to the problem of collecting a judgment against a state.

In the Yost case[98] the court was asked to appoint a commissioner to levy, collect and pay over a tax to a judgment creditor of a county. It declined to do so, rejecting the contention that the statutes in existence when the bonds were issued authorized such an exertion of judicial power and therefore brought the case within the principle of *Supervisors* v. *Rogers*.[99] But it prefaced its consideration

[92] *Ibid.*

[93] *Ibid.*

[94] Among them are the cases cited supra, notes 17 and 18, and infra, note 106.

[95] 236 U. S. 50 (1915). For a discussion of this case see a note in 28 Harvard Law Review 617.

[96] *Virginia* v. *West Virginia*, 220 U. S. 1 (1911).

[97] Supra, note 95.

[98] Supra, note 95.

[99] 7 Wall. 175 (1869). For a statement of this case, see infra, pages 29 and 30. In *Yost* v. *Dallas*, Mr. Justice McKenna and Mr. Justice Pitney dissented, but without opinion. There is no way of knowing whether they based their dissent on a different interpretation of the state statute, or on disapproval of the general doctrine which has restrained the court from collecting taxes through its own officers.

of the question of statutory construction by a discussion quite unnecessary to the case in hand but most pertinent to the problem now raised for argument. In the words of Mr. Justice HOLMES:

> "The fundamental consideration for answering these questions is that the obligation upon which the judgment was recovered was an obligation under, not paramount to, the authority of the state. It is true that the district court of the United States had jurisdiction of the suit upon the contract, but the extent of the obligations imposed was determined by the statutes of Missouri, not by the Constitution of the United States or any extraneous source, the Constitution only requiring that the obligation of the contract should not be impaired by subsequent state law. The plaintiff, by bringing suit in the United States court, acquired no greater rights than were given to him by the local statutes. The right so given was to have a tax levied and collected, it is true, but a tax ordained by and depending on the sovereignty of the state, and therefore limited in whatever way the state saw fit to limit it when, so to speak, it contracted to give the remedy".[100]

This writing on the wall has little need of an interpreter. West Virginia's obligation to Virginia cannot conceivably come within the description of the obligations incurred by counties and municipalities. It easily comes within the description of the obligations excluded from the doctrine of the cases in which the court declines to act as tax gatherer. Its extent was determined, not by the statutes of the state, but by some source extraneous to those statutes. It is declared to be an obligation under the Constitution of the United States. The right of Virginia was not subject in its inception to limitations imposed by statutes of West Virginia, for it arose before the West Virginia legislature came into existence as the legislature of a state. The remedies for its enforcement are in no way limited by provisions emanating from the sovereign power of West Virginia at the time the right arose, for there were none. They are limited, if at all, only by some inherent weakness in the judicial power of the Supreme Court of the United States. And such weakness, if it exist, is entirely independent of anything in the constitution or laws of any state.

Mr. Justice HOLMES plainly means to make it clear that the court is now of opinion that it was not from any defect of judicial power

[100] 236 U. S. 50, 56.

that federal courts have refrained from the administrative work of laying and collecting taxes to satisfy judgments rendered by them. It was because the judgment creditors before the courts were in no position to ask for such an exercise of judicial power. That there are intimations to the contrary in the cases in which the court has refused the requests of judgment creditors, it would be futile to deny.[101] Mr. Justice HOLMES does not seek to deny it. On the contrary he seems to be aware of such intimations, and to disapprove of them and limit them. For he says of the language of his predecessors that "some of it may go farther than was necessary or than we should be prepared to go in a different case".[102] And his earlier discussion makes it clear enough that the "different case" which he has in mind is a case against some other governmental entity than a city or county. Such a case is one against a state.

Thus before the writing of the opinion in the present matter in dispute between Virginia and West Virginia, the court had negatived any application of the cases against municipalities to cases against a state, in so far as they seemed to stand in the way of the levy and collection of taxes by an officer of the court. But this does not necessarily lend support to the venture which the court now asks the contending parties to support and resist by argument. Some independent foundation must be laid. But where there is a will, it is not difficult to find a theory.[103] The Supreme Court's unequiv-

[101] One of the strongest statements is by Mr. Justice Miller in *Heine* v. *Board of Levee Commissioners*, 19 Wall. 655, 660-661 (1874): "There does not appear to be any authority founded on the recognized principles of a court of equity on which this bill can be sustained. If sustained at all it must be on the very broad ground that because a plaintiff finds himself unable to collect his debts by proceedings at law, it is the duty of a court of equity to devise some mode by which it can be done. It is, however, the experience of every day and of all men, that debts are created which are never paid, though the creditor has exhausted all the resources of the law. It is a misfortune which, in the imperfection of human nature, often admits of no redress. . . .

The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, state or national. . . . The power must be derived from the Legislature of the State. . . . It certainly is not vested, as in the exercise of an original jurisdiction, in any Federal Court. . . . It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the Federal Government of the legislative functions of the state government."

While not all of Mr. Justice Miller's reasoning is applicable to the present case of West Virginia, his statement that "it is not one of the inherent powers of a court of equity" to levy taxes, is broad enough to cover the present issue. Nevertheless the Supreme Court might hold that it is not confined to the ordinary powers of a court of equity in acting in a capacity which may be characterized as that of authoritative arbitrator in a quasi-international controversy.

[102] 236 U. S. 50, 57.

[103] Compare Peckham, J., in *Bohm* v. *Metropolitan Elevated Ry. Co.*, 129 N. Y. 576, 587 (1892): "Hence, when under legislative and municipal authority the railroad structure was built, it was supposed by many there was no liability to abutting owners, because no

ocal assertion of its power and duty to enforce the judgment against West Virginia, if enforcement shall be necessary, seems sufficient evidence of the will. And for the theory it need only go to the dissenting opinion of Mr. Justice CLIFFORD in *Rees* v. *Watertown*,[104] the leading case in which the court declined to subject the taxable property of a city to the payment of a judgment rendered against it. This was as follows:

> "I dissent from the opinion of the court in this case upon the ground that equity will never suffer a trust to be defeated by the refusal of a trustee to administer the fund, or on account of the misconduct of the trustee, and also because the effect of the decree in the court below, if affirmed by this court, will be to give judicial sanction to a fraudulent repudiation of an honest debt. For which reasons, as it seems to me, the decree of the subordinate court should be reversed".[105]

With Mr. Justice CLIFFORD dissented also Mr. Justice SWAYNE, and their dissent was continued in the later case of *Heine* v. *The Board of Levee Commissioners*.[106] Now that the decision of the majority in those cases is regarded as dependent on a defect in the right of the creditor, the theory of the minority can be accepted and applied to a case where the plaintiff is not burdened with any such defect.

It must of course be recognized that this trust theory is a loose one and is applicable to the present situation only by somewhat tenuous analogy. But the court throughout the litigation has treated it as something quite different from an ordinary lawsuit. In an opinion rendered in 1910, it said:

> "The case is to be considered in the untechnical spirit proper for dealing with a quasi-international controversy, remembering that there is no municipal code governing the matter, and that this court may be called upon to adjust differences that cannot be dealt with by Congress or disposed of by the legislature of either state alone".[107]

land of theirs was taken, and any damage they sustained was indirect only, and damnum absque injuria. When the courts acquired possession of the question, and it was seen that abutting land, which, before the erection of the road, was worth, for instance $10,000, might be reduced to a half or a quarter of that sum in value, or even rendered practically worthless, by reason of the building of the road, *it became necessary to ascertain if there were not some principle of law which could be resorted to in order to render those who wrought the damage liable for their work.* It has now been decided that . . . . *By this mode of reasoning the difficulty . . . was overcome.*" Italics are writer's.

[104] 19 Wall. 107 (1874).
[105] 19 Wall. 107, 125.
[106] 19 Wall. 655 (1874).
[107] *Virginia* v. *West Virginia*, 220 U. S. 1, 27.

In this spirit the court has allowed West Virginia latitude and delay that would hardly have been accorded to an individual defendant. And by the same token it may be expected, when it has finally determined the matter of right and duty, to avail itself of common-law analogies that reach the substance even though they may be less close in respect to form.

But aside from Mr. Justice CLIFFORD's trust theory, there is other support for collecting a judgment against a public corporation by judicial levy on the taxable property within its borders. A reference to this appears in *Supervisors* v. *Rogers*,[108] in which the Supreme Court sanctioned the judgment of the circuit court below in ordering that the marshal be appointed a commissioner to levy a tax in satisfaction of a judgment against a county. The decision was based on the fact that a statute of the state, in existence when the debt was created, provided that where the defendant refuses to perform a duty enjoined by mandamus, the court may direct that the required act be done by the plaintiff or by some other person appointed by the court. It was held that this practice, prescribed for the state courts, could be adopted by the federal court in the particular case even though not adopted prior to the bringing of the suit. In referring to the requirement of the statute, Mr. Justice NELSON said:

> "This section is but a modification of the law of England and of the New England States, which provides for the execution of a judgment recovered against a county, city or town, against the private property of any individual inhabitant, giving him the right to claim contribution from the rest of the people".[109]

The doctrine is stated by DILLON as follows:

> "In the *New England States* judgments against municipalities are not enforced by *mandamus*, but in a mode peculiar to those States. By the common law of the New England States, derived from immemorial usage, the estate of any inhabitant of a county, town, terirtorial parish, or school district, is liable to be taken on execution on a judgment against the corporation".[110]

[108] 7 Wall. 175 (1869).
[109] 7 Wall. 175, 181.
[110] *Op. cit.*, sec. 1506 (volume 4, page 2673, note 4). Of the cases cited in support of the statement, see especially *Beardsley* v. *Smith*, 16 Conn. 368 (1884). See also Dillon, *op. cit.*, sec. 1639 (volume 4, page 2885, note 2).

This is not the common law of many of the jurisdictions which compose the United States. But the reasons which have induced its creation or acceptance by some of the states may easily be sufficient to secure its adoption by the Supreme Court of the United States in a situation where other precedents are held not apposite, and where some capsule of theory is desired to carry the medicine of substantial remedial justice.

The court could hardly have asked for argument on a form of remedy which the moving party refrained from urging and even disclaimed, unless it had been somewhat predisposed to consider it favorably. Such a predisposition has no obstacle to encounter in the precedents, for the situation is novel, and precedents against it are therefore lacking. The levy of a tax through officers of the court can without stretch of logic or of sense be rested on the declared principle of the authority and the duty of the court to compel the payment of the judgment, especially if it should appear that such a levy is the only remaining mode of compelling that payment. When to this is added the direct support of the common-law practice obtaining in some of the states, with perhaps the additional flying buttress of the theory that the taxing power is held in trust and that the court can appoint a substitute for a recusant trustee, it can readily be appreciated that all that stands in the way of the Supreme Court's appointment of a tax gatherer to subject West Virginia property to the payment of West Virginia's debts is the lack of will to do so.

IV

That the Supreme Court is reluctant to impose coercion upon West Virginia in any form is apparent. But that this reluctance, as some have thought,[111] is due in any degree to a doubt as to the duty or authority to impose that coercion, if it shall ultimately be necessary, is with great difficulty to be believed. As unbiased a reading of the court's latest utterance as one aloof from the interests of the contending parties can give, leads only to the inference that the reluctance is due wholly to the belief, as expressed by the Chief Justice, that "if we refrain now from passing on the questions stated, we may be spared in the future the necessity of exerting compulsory power against one of the states of the Union to discharge a plain duty resting upon it under the Constitution".[112] This inference is fortified by the later insistence that "the judgment against the state operating upon it in all its governmental powers and the duty to enforce it viewed in that aspect" are "things which are irrevocably foreclosed".[113]

[111] See the note in 31 Harvard Law Review 1158-1161. In criticism of the treatment of the problem contained in this note, it may be said that it fails in "not accepting things which are irrevocably foreclosed—briefly stated, the judgment against the state operating upon it in all its governmental powers, and the duty to enforce it viewed in that aspect" (Chief Justice White in 246 U. S. 565, 605) and therefore makes use of premises which the court in its opinion discountenances.

All that is left open for further argument and determination is the force of the technical objections to the particular remedies available to the court in the discharge of its duty to enforce the judgment—whether "any of the processes stated are susceptible of being lawfully applied".[114] Such questions the court is careful to say that it does not now decide. But one of them hardly admits of debate. Accepting the decision that the legislature in the instant case is as subject to coercion as any inferior governmental agent would be, its only remaining shield is the contention that its duties with respect to raising money are discretionary and so cannot be enforced by mandamus. But the cases are clear that its discretion is not overridden when it fails to exercise it and is then compelled to do so. The other question which the court asks of its own motion is more disputable. Well-recognized objections to the judicial levy of taxes do not necessarily lose their weight because carried over to novel situations. Yet against these objections must be balanced the considerations in favor of not permitting what are essentially technicalities to deprive the Supreme Court of power to perform what it finds and declares to be its duty.

The problem under consideration affords interesting opportunity for various ways of looking at the law. The treatment here given has been dominated by the attitude which regards the law, after the thought of Mr. Justice Holmes, as a prophecy of what courts will do in fact. That is the law that clients wish to know about, and the law that governs our affairs. It may lack the enthralling spell of the law that ought to be, but never is on sea or land, the law that is right reason and the universal principles of justice, the law that accords with our desires. Right reason and the principles of justice are undoubtedly made manifest to us not exclusively through the decisions and the opinions of courts. But it is that part which courts discover or make, and then apply, that determines what is legal and what illegal in the mundane, practical life of man. And so on the question whether a state can be coerced by the Supreme Court of the United States, it is of prime importance to know what the Supreme

[112] 246 U. S. 565, 604.

[113] 246 U. S. 565, 605. The exact order of the language of the Chief Justice is given in note 111, supra.

[114] 246 U. S. 565, 605.

Court thinks about it. For the Supreme Court is the authority duly entrusted with the decision.

In no field is prophecy of what a court will do so precarious as in the field of constitutional law. Nevertheless one would be intemperately timid who hesitated to base on the Supreme Court's opinion in the latest stage of the Virginia-West Virginia controversy a confident belief that it will not allow its judgment to become a nullity through the inaction of the defendant. To this must be added one's tribute to the statesmanship that accords to the defendant the respect which refuses to believe that this inaction will continue, now that the question of duty is authoritatively and finally determined.

THOMAS REED POWELL.

Columbia University.

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